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No. 90-1844

In The

Supreme Court of the United States

October Term, 1990

RAY JAMES MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs at Law and Wrongful Death Beneficiaries of Elaine Munn, Deceased,

Petitioner,

vs.

TRUDY E. ALGEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petitioner's constitutional right to free exercise of religion requires the creation of a special religion exemption to the application of the avoidable consequences doctrine, a neutral, valid and generally applicable rule of law.

2. Whether cross-examination concerning the sincerity of the Munns' religious beliefs was proper since the petitioner injected that issue into the trial and since the District Court allowed the jury to consider these religious beliefs as a factor in determining whether the refusal of medically recommended blood transfusions was unreasonable.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Southern Health Plan, Inc., d/b/a IPA Apple Plan, was an intervening plaintiff in the District Court. Southern Health Plan did not appear in the Court of Appeals. Michigan Mutual Insurance Company provided a defense to the respondent under the terms of an insurance contract between respondent and Michigan Mutual. Michigan Mutual is affiliated with Amerisure, Inc., Amerisure Insurance Company, Amerisure Ltd. and Amerisure Texas Corporation.

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No. 90-1844

In The

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RAY JAMES MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs at Law and Wrongful Death Beneficiaries of Elaine Munn, Deceased,

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OPINIONS BELOW

The Fifth Circuit Court of Appeals' opinion is reported as *Munn v. Algee,* 924 F.2d 568 (5th Cir. 1991). This opinion is

included in the appendix to the petition for writ of certiorari at A1-A39.

The District Court's post-trial opinion after consideration of the petitioner's motion for a new trial is reported as *Munn v. Algee,* 730 F. Supp. 21 (N.D. Miss. 1990). This opinion is included in the appendix to the petition for writ of certiorari at A40-A57.

A pre-trial opinion rendered by the District Court granting the defendant's motion for partial summary judgment is reported as *Munn v. Southern Health Plan, Inc.,* 719 F. Supp. 575 (N.D. Miss. 1989). This opinion is included in the appendix to the petition for writ of certiorari at A58-A72.

None of these decisions are included in the appendix to this brief. The respondent has, however, included as an Appendix to her brief an unreported decision rendered by the District Court in chambers immediately prior to commencement of the trial. This opinion is re-copied from pages 5 through 16 of the trial transcript, and is included as respondent's appendix at 1ra-9ra.

STATEMENT OF THE CASE

The petitioner, Ray James Munn, brought this action against the respondent, Trudy Algee, as a result of an automobile accident which occurred at approximately 9:00 a.m. on December 25, 1986. The attorneys for petitioner filed suit on September 24, 1987, in the United States District Court for the Northern District of Mississippi, Delta Division. He brought the action in an individual capacity, as administrator for the estate of his deceased spouse, Elaine Munn, as well as on behalf of the wrongful death beneficiaries of Elaine Munn under the Mississippi Wrongful Death Statute, Miss. Code Ann., § 11-7-13 (1972).

The basic facts underlying the automobile accident in question were never disputed by the parties. Elaine Munn was injured at approximately 9:00 a.m. on December 25, 1986, when the car in which she was riding was struck by a vehicle driven by the respondent. The cause of the accident was stipulated to be Trudy Algee's negligence in attempting to pass a tractor-trailer rig just prior to the collision.

After the accident, Elaine Munn was taken to Tunica County Hospital in Tunica, Mississippi. After x-rays and other tests were administered she was taken to the Regional Medical Center in Memphis, Tennessee. Approximately eight to nine hours after the collision, she died during surgery after she and her husband repeatedly refused to allow medically recommended blood transfusions. Their reason for refusing the blood transfusions was based on their adherence to the Jehovah's Witness religious faith.

Early in this litigation, counsel for the petitioner filed a motion for summary judgment requesting that the court enter a judgment in his favor that the avoidable consequences doctrine should not apply to this case because the Munns' refusal to accept medically recommended blood transfusions was in accordance with the tenets of their religious faith. The petitioner argued that the Munns' refusal of blood on religious grounds was not unreasonable as a matter of law. The District Court denied this motion.

Thereafter, the respondent's counsel filed her motion for partial summary judgment as to all post-death damages asserting, *inter alia,* that should the jury decide that the Munns' refusal of medically recommended blood transfusions was unreasonable and that Elaine Munn's death would have been avoided if the transfusion had been accepted. The District Court granted this motion. *See Munn v. Southern Health Plan, Inc.*, 719 F. Supp. 525 (N.D. Miss. 1989) (Pet. App. A58-A72). While the respondent also argued that the petitioner had the burden of proving the

causation of Elaine Munn's death, the District Court did not rule on this issue in granting respondent's motion. The court did ultimately decide in its pretrial chambers conference on the first day of trial that respondent had the burden of proof for the defense of avoidable consequences, rejecting respondent's argument that the petitioner had the burden of proving Elaine Munn's wrongful death (Resp. App. 1ra-9ra). The questions which necessitated trial were what amount of damages should be awarded for Elaine Munn's pain and suffering from the time of the accident to the time of her death, whether her death was avoidable, whether the Munns' refusal of blood was unreasonable under the circumstances, and what amount of damages should be awarded for wrongful death if the respondent did not carry her burden of proof on avoidable consequences.

The matter was tried for five days in Oxford, Mississippi, to a bi-racial jury during August of 1989. The jury returned a verdict for Elaine Munn's estate in the amount of $20,411.67 as compensation for medical expenses incurred by her and for pain and suffering through the time of her death. These damages were awarded to the estate of Elaine Munn under Mississippi's Survival Statute, Miss. Code Ann., § 91-7-233 (1972).

The jury found that the death of Elaine Munn was 100 percent attributable to her and her husband's repeated refusal of blood transfusions, that their refusal was unreasonable, and that Elaine Munn would have survived if they would have accepted the transfusions. Thus, the jury awarded no damages for wrongful death.

SUMMARY OF ARGUMENT

What the petitioner seeks in this case is a special religious exemption to a longstanding and consistently applied rule of law. The avoidable consequences doctrine has been applied in all types

of cases to judge whether a plaintiff failed to take all actions reasonable under the circumstances to mitigate damages. The decisions of this Court hold that a valid religion-neutral law of general applicability does not infringe upon an individual's free exercise rights, even if it has some incidental effect on some religious activities. *Employment Division, Department of Human Resources of Oregon v. Smith,* 110 S. Ct. 1595 (1990). The avoidable consequences doctrine is just such a rule. Indeed, the petitioner's position and that of the District Court would violate the establishment clause by creating a special preference for the Munns' religious views (Pet. App. at A12-A13).

The Munns failed to mitigate their damages in this case. Even if this Court were to hold that the District Court was right to allow the jury to consider the Munns' religious views in making its decision, the jury, considering the circumstances of this case, and taking the Munns' religious views into consideration, found that their actions were not reasonable. Therefore, under either the approach of the District Court or the Court of Appeals, petitioner has failed to mitigate damages. For petitioner to prevail, this Court must adopt a rule saying that a religious reason for failing to take a mitigating action is *per se* reasonable under all circumstances. The decisions of this Court, expecially *Smith,* and the history of the avoidable consequences rule, do not support such a result.

The petitioner placed the Munns' religious beliefs in issue in this trial in response to respondent's assertion of the defense of avoidable consequences. This was done to offer some explanation of their refusal to accept medically recommended blood transfusions on the issue of whether the Munns' actions were unreasonable. Consequently, the petitioner, and not respondent, forced the issue of the sincerity of their religious beliefs into this trial.

During voir dire and opening statement, petitioner's counsel attempted to invoke the sympathy of the jury for his clients by discussing their faith on numerous occasions. Moreover, at the outset of Ray Munn's testimony on direct examination, petitioner's counsel elicited from him various statements about how zealously he and Elaine Munn held their beliefs. It was in this context that the District Court permitted defense counsel to inquire into the sincerity of petitioner's religious beliefs relating to his knowledge of and adherence to other tenets of the Jehovah's Witness faith.

The District Court gave much deliberation to the evidentiary ruling in question. Because the objection to these questions came at the close of the first day of trial, the court had an opportunity to consider this matter overnight. After due deliberation, it overruled petitioner's objection acknowledging the emphasis which had been placed by Munn's counsel on the sincerity of their religious beliefs up to that point in the trial.

While the Court of Appeals determined that the evidence under scrutiny was irrelevant and that its admission was an abuse of discretion, it held the error to be harmless after a thorough review of the record. The Fifth Circuit also ruled that Ray Munn's testimony did not adversely influence the jury and was utterly irrelevant in light of the substantial amount of expert medical testimony produced by both sides on the issue of whether Elaine Munn would have lived had she and her husband allowed the medically recommended blood transfusions.

Additionally, the Court of Appeals decided that the petitioner had failed to articulate any substantial right affected by the admission of the evidence. Each jury verdict was scrutinized and each was determined by the court to have been supported by the evidence presented at trial. Since the petitioner did not establish that a substantial right had been effected, the evidentiary ruling was harmless.

For the foregoing reasons, the petitioner's request for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTION DOES NOT REQUIRE THE CREATION OF A SPECIAL RELIGIOUS EXEMPTION FOR THE PETITIONER TO THE APPLICATION OF THE AVOIDABLE CONSEQUENCES DOCTRINE, A NEUTRAL, VALID AND GENERALLY APPLICABLE RULE OF LAW.

The petitioner in this case seeks to carve out a religious exemption to the avoidable consequences rule, a long established rule requiring a party that has been damaged by another to use reasonable care and effort to minimize their injury. The issue is whether the Constitution requires that a religious exemption to the avoidable consequences rule be created. The answer to this question is controlled by this Court's recent decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990). Because this Court's analysis in *Smith* clearly controls and was properly applied by the Court of Appeals, the petition for writ of certiorari should be denied.

A. The *Smith* Decision

In *Smith*, the petitioners were fired by a drug rehabilitation organization because they used peyote, a substance whose knowing or intentional possession is a felony under Oregon law unless prescribed by a doctor. Peyote was used by the petitioners in a ceremony of the Native-American Church. After their dismissal, petitioners were denied unemployment benefits because they had been dismissed for work related misconduct. The petitioners argued

that this denial of benefits violated their free exercise rights under the First Amendment.[1] This Court held that the right to free exercise of religion did not eliminate an individual's obligation to comply with a valid and neutral law of general applicability even if there was some incidental effect on the petitioner's right to free exercise of religion. *Id.* at 1603-04.

The Court stated:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng, supra,* 485 U.S. at 451, 108 S.Ct. at 1326. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" —permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States*, 98 U.S. at 167, contradicts both constitutional tradition and common sense.

Id. at 1603.

Likewise, the avoidable consequences rule is a neutral law of general application which this Court, following the *Smith* decision, should apply to all plaintiffs even if it has some incidental effect on the petitioner's exercise of their religious beliefs.

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1. This Court first asked the Oregon Supreme Court to determine if the sacramental use of peyote was unlawful *Department of Human Resources of Oregon v. Smith*, 485 U.S. 660 (1988) (*Smith* I); the sacramental use of peyote was found to be illegal under the Oregon statute. 763 P.2d 146, 148 (1988).

B. The Avoidable Consequences Doctrine Is Religion-Neutral And Is Generally Applied.

There are numerous decisions applying the avoidable consequences rule in Mississippi dating back to at least 1918. *Scott and Garrett v. Green River Lumber Co.*, 77 So. 309 (Miss. 1918). The purpose of the rule is to discourage people who have suffered loss from passively suffering additional loss. In this way, accident costs are minimized and the economic welfare of all of society is protected. C. McCormick, *Handbook on the Law of Damages*, § 33 at 127 (1935).

The rule has been applied to all types of alleged wrongs. C. McCormack, *supra*, § 33 at 127 (1935) ("where one person has committed a tort, breach of contract or other legal wrong against another, it is encumbent upon the latter to use such means as reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided."); *Yazoo and M.V.R. Company v. Fields*, 195 So. 489 (Miss. 1940) ("This rule [avoidable consequences] applies to all injuries wrongfully inflicted, whether by means of a tort or the breach of a contract,". . . *Id.* at 490). Therefore, the rule has a long history and has been generally applied to all types of cases.[2]

C. The Application Of The Avoidable Consequences Rule Is Not Unconstitutional Because It Has An Incidental Effect On Petitioner's Free Exercise Of Religion.

Petitioner objects to the use of the avoidable consequences

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2. Petitioner does not even attempt to argue that the adoption of the avoidable consequences doctrine was aimed at the regulation of religious beliefs nor is this "hybrid situation" where in addition to an incidental effect on religion there is a violation of another constitutional provision. *Id.* at 1601-02.

rule in this case because it incidentally affects the Munns' free exercise of religion. However, even prior to *Smith*, this Court has held that an individual's religious views do not relieve them of the responsibility of obeying otherwise valid, generally applicable laws.

Justice Frankfurter's opinion in *Minersville School District, Board of Education of Minersville School District v. Gobitis*, 310 U.S. 586 (1940), reflects the balance struck between the applicability of general laws and individual religious beliefs:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from discharge of the political responsibilities.

Id. at 594-595; also quoted in *Smith,* 110 S. Ct. at 1600. *See also, Reynolds v. United States,* 98 U.S. 145 (1878); *Prince v. Massachusetts*, 321 U.S. 159 (1944) (mother could be prosecuted under child labor laws even if her actions were religiously motivated); *United States v. Lee*, 455 U.S. 252 (1982) ("Congress and the Courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs" *Id.* at 261).

The clear teaching of *Smith* is that the government must be free to enforce "generally applicable prohibitions" which are religion-neutral even if they burden a particular religious practice. *Id.* at 1603-1604.

D. Whether The Test Of The District Court Or The Court Of Appeals Is Applied, Petitioner Has Not Satisfied The Requirements Of The Avoidable Consequences Doctrine.

The petitioner finds fault with both the procedure of the District Court and the Court of Appeals. The petitioner objects to the District Court approach because they allege it allows the jury to decide whether adherence to a particular religious tenet is reasonable. The petitioner and respondent agree that a jury should not be allowed to determine the validity of an individual's religious beliefs based on the jury's own judgment of their acceptability. Allowing a jury to make such a determination is inconsistent with the decisions of this Court. *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1981); *Jones v. Wolf,* 443 U.S. 595 (1979); *United States v. Seeger,* 380 U.S. 163 (1965); *United States v. Ballard,* 322 U.S. 78 (1944).[3]

While the respondent will detail why she believes the Court of Appeals' approach is proper, the charge given to the jury by the District Court which the petitioner now finds constitutionally deficient, was in fact favorable to them. Absent consideration of the religious basis for refusing the blood transfusions, the Munns' conduct in refusing the transfusion after being told that she would die without it, would certainly have been found unreasonable under the circumstances by the jury.[4] What the District Court was seeking to do was allow the jury to factor in the religious views of the petitioner in making its objective

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3. However, the jury may consider and evidence is admissible on the issue of whether the religious position put forward is sincerely held. Respondent will discuss this point more fully in part II of this memorandum.

4. As noted by the Court of Appeals' opinion, the petitioner's brief conceded as much (Pet. App. A13, n. 11). This was clearly the view of the Court of Appeals.

determination of whether their actions were reasonable or not.

This approach has some support in the case law. In *Lange v. Hoyt*, 159 A. 575 (Conn. 1932), on the issue whether Christian Scientist parents who follow the tenets of their faith in the medical treatment of their child, satisfy the requirements of the avoidable consequences rule, the Connecticut Supreme Court held:

> The jury was told that the conduct of both plaintiffs with reference to the presence or absence of reasonable care was to be judged in the light of all the surrounding circumstances including whatever belief as to methods of treatment the jury might have found they conscientiously held. The reference in the last clause of this charge was to the fact that the plaintiff Minette B. Lange was a Christian Scientist and her conduct in the effort to promote the recovery of her daughter was in part at least actuated by the tenents of that belief. While the test of conduct on the part of a plaintiff in promoting a recovery from injuries suffered is one of reasonable care and cannot be made to depend upon the idiosyncrasies of personal belief no matter how honestly held, courts cannot disregard theories as to proper curative methods held by a large number of reasonable and intelligent people.

159 A. at 577-578 (Conn. 1932).

In *Christiansen v. Hollings*, 112 P.2d 723 (Cal. 1941), the California Court of Appeals held:

> If the injured party is a believer in Christian Science, the jury should be instructed, as it was

> instructed in this case, that such belief is a factor to be considered with all the other evidence in determining whether the injured person used reasonable diligence in caring for his injuries. If the injuries are such that a reasonable prudent man would seek medical care, such care must be secured. But where the injuries are not of such a nature, as in the present case, the jury may properly consider the religious beliefs of the injured person in ascertaining whether he exercised reasonable care.

Id. at 730.

There is also case law to support the Court of Appeals position. In *Corlett v. Castera*, 562 N.E. 2d 257 (Ill. App. 1st Dist. 1990) the court held:

> Nevertheless, there is marked distinction between a patient's exercise of his fundamental and religious rights to refuse a life saving medical treatment and a patient's attempt to impose the consequences of his religious decision upon a physician who has committed a tort against him. The freedom to act upon one's religious convictions does not encompass the privilege of imposing tort liability on another for injuries resulting not from another's tortious conduct, but rather from the voluntary practice of one's religious convictions. (Citations omitted.)[5]

Id. at 262.

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5. *See also, Walter Nashert & Sons v. McCann*, 460 P.2d 941 (Okla. 1969); *Industrial Commission v. Vigil*, 373 P.2d 308 (Col. 1962).

On the other hand, petitioner cites several cases to support his position that sincere objections to medical treatment cannot be overridden for the benefit of the tortfeasor. *Montgomery v. Board of Retirement*, 109 Cal. Rptr. 181 (5th Dist. 1973), 33 Cal. 3d 447 (1973), cited by the petitioner, applied strict scrutiny to an indirect burden on religion citing *Sherbert v. Verner*, 374 U.S. 398 (1963), as authority. *Montgomery*, however, is contrary to this Court's recent holding in *Smith*. Also, in *Cero v. Oynesondo*, 138 A. 45 (1927) after the quotation cited by petitioner saying that whether a tort victim must undergo surgery is peculiarly personal and that the law does not allow the jury or court to decide it for the individual, the court stated:

> Under such circumstances plantiff, having available modern surgical science, may not be permitted to decline to take advantage of an opportunity to be cured or improved and charge the continuance of blindness to defendants. In such an event an award of damages based on the theory of permanent loss of sight would be excessive. (Citations omitted).

Id. at 46.

The remaining cases cited by the petitioner do not involve situations where the plaintiff refused to undergo surgery that was essential to save his or her life. Therefore, unlike this case, it was arguable whether the possible benefits of the surgery justified the risks.[6]

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6. Petitioner also contends that the widely accepted principle of American tort law that the wrongdoer takes his victim as he finds him should be applied in this case. Respondent agrees that it is a widely accepted principle, but the petitioner ignores that it has only been applied in cases involving physical conditions. Restatement (2d) § 461; Prosser, *Handbood of the Law of Torts*, § 43 (4th ed. 1971) (Pet. at A15).

(Cont'd)

The petitioner claims that he seeks only to have their religious beliefs treated the same as other strong personal reasons for failure to take certain actions to mitigate damages (Pet. at 10). However, they object to the District Court's approach in allowing the jury to consider the Munns' religious beliefs. There are no personal reasons under Mississippi law for failing to take action to limit injury which have been found to be *per se* justifications for avoiding the requirement of the avoidable consequences rule regardless of the circumstances.

The jury in this case found, even taking the Munns' religious convictions into consideration, that under the circumstances they did not take the reasonable steps necessary to mitigate their damages. The same result must follow if the Court of Appeals' view, which does not allow the jury to consider her religious beliefs, is adopted. Therefore, under either of these two tests, the plaintiff's conduct did not satisfy the requirements of the avoidable consequences rule.

The result in this case would only change if this Court holds that no matter what the Munns' conduct, if it is done because of a sincerely held religious conviction, it was *per se* reasonable under the avoidable consequences doctrine. Despite petitioner's arguments to the contrary, this conclusion is not supported by the decisions of this Court, particularly the decision in *Smith*.

(Cont'd)

It is the petitioner that seeks to ignore well established principles of tort law by seeking to recover damages, if wrongful death damages are denied them, for damage Mrs. Munn may have sustained even if she had the transfusion and lived (Pet. at 18), as the Court of Appeals held these damages were speculative and could not be determined in terms of reasonable probabilities (Pet. App. A14). Thus, there are not one but two widely accepted principles of law petitioner seeks to ignore in this case.

The petitioner's position would court the sort of social anarchy this Court warned of in *Smith*:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S. at 606, 81 S.Ct. at 1147, and precisely because we value and protect that religious diversion, we cannot afford the luxury of deeming presumatively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule Respondent's favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind (Citations omitted).

Smith, 110 S. Ct. at 1605.

The cases cited by the petitioner in Argument II-C of their petition starting with *Sherbert v. Verner*, 374 U.S. 398, are not applicable to this case. Even assuming that this line of cases after *Smith* has validity outside of the unemployment compensation field, *Smith*, 110 S. Ct. at 1603, the petitioner must show that a system of individualized exemptions has been created. This is not the case here. The avoidable consequences rule has been applied to all plaintiffs in all cases. The respondent is aware of no Mississippi case that holds that a particular group is *per se* exempt from the requirements of this rule as a matter of law no matter what the surrounding circumstances. The unavoidable consequences rule no more established a system of individual exemptions than did the statute in *Smith* which denied unemployment benefits for work related misconduct.

E. A Special Religious Exemption For Petitioner To The Avoidable Consequences Doctrine Violates The Establishment Clause.

In addition to being contrary to *Smith*, the outcome suggested by petitioner would be contrary to the establishment clause.

This Court has consistently held that the government may not favor one religious belief over another or promote or affiliate itself with any particular religious doctrine. *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Edward v. Aguillard*, 482 U.S. 578 (1987) (preference for a particular religious belief over another is the unconstitutional endorsement of religion).

Petitioner in this case asks that the Munns' religious views concerning blood transfusions receive preferential treatment by the courts in the application of the avoidable consequences doctrine. This the Constitution simply does not allow. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989) ("on the contrary the Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths" *Id.* at 3110).[7]

F. The Court Of Appeals' Decision Is Consistent With *Smith*.

The petitioner argues that the Court of Appeals misconstrued *Smith*. In fact, the decision by the Court of Appeals is both consistent with *Smith* and with the interpretation given *Smith* by other courts.

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7. The petitioner now appears to agree that the District Court approach violates the establishment clause (Pet. at 12).

The Court of Appeals recognized that the avoidable consequences rule is a neutral rule of general applicability. Therefore, the petitioner was obligated to comply with it even if it had the incidental effect of burdening a particular religious practice. This view is consistent with how other courts have interpreted *Smith*. *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3rd Cir. 1990); *Montgomery v. County of Clinton, Michigan*, 743 F. Supp. 1253 (W. Dist. Mich. 1990).

II.

CROSS-EXAMINATION CONCERNING THE SINCERITY OF THE MUNNS' RELIGIOUS BELIEFS WAS PROPER SINCE THE PETITIONER INJECTED THAT ISSUE INTO THE TRIAL AND SINCE THE DISTRICT COURT ALLOWED THE JURY TO CONSIDER THESE RELIGIOUS BELIEFS AS A FACTOR IN DETERMINING WHETHER THE REFUSAL OF MEDICALLY RECOMMENDED BLOOD TRANSFUSIONS WAS UNREASONABLE.

A. Munn's Counsel Forced The Sincerity Of Their Religious Beliefs Into This Trial.

The petitioner complains that specific questions posed to him on cross-examination were irrelevant, prejudicial, and that the admission of these questions was not harmless error.[8] The opinion

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8. The petitioner gleans much of his support for this proposition from Judge Rubin's dissenting opinion (Pet. App. A24-A39). With all due respect, the practical effect of this view would have this Court decide this case in a vacuum without regard to Munn's counsel's trial advocacy techniques, tactical decisions, and attempts to play on the sympathy of the jury. Moreover, this view is devoid of a consideration of defense counsel's need to pose these questions in light of Ray Munn's espoused theory of the case and of his testimony on direct examination.

of the Court of Appeals written by Judge Smith determined that these questions were irrelevant, that admission of same was error, but that the error was harmless. In a specially concurring opinion, however, Judge Barksdale determined that the evidence was relevant to the doctrine of avoidable consequences,[9] and that the questions were responsive to Munn's direct testimony.[10]

A careful analysis of the pre-trial rulings, the trial developments and Ray James Munn's direct and cross-examination testimony is necessary, however, to place in perspective the propriety and necessity of defense counsel's line of questioning and how same related to the issues that were decided by the jury. In this regard, it is important to note that Algee's counsel did not inject the Jehovah's Witness doctrine or the sincerity of their adherence to this faith into this lawsuit. Rather, when the respondent raised the defense of avoidable consequence, the petitioner "came forward with the explanation that the refusal to accept the recommended medical care was in keeping with the Munn's religious belief" (Pet. App. A55).

More specifically, after the respondent filed her answer asserting, *inter alia,* the defense of avoidable consequences, the petitioner filed a motion for summary judgment requesting the court to enter a judgment that that doctrine should not apply to the facts of this case because the Munns' refusal or medically recommended care in accordance with their religious beliefs was not unreasonable as a matter of law. The District Court denied this motion.

Thereafter, the respondent filed her motion for partial

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9. Judge Barksdale also opined that petitioner's counsel did not make the requisite Fed. R. Evid. 103(a)(1) objection (Pet. App. A24).

10. *Id.*

summary judgment as to all post-death damages asserting the application of the defenses of assumption of risk, contributory negligence, and avoidable consequences. In response to this motion, petitioner's counsel argued that only the avoidable consequences doctrine should be applied to the facts of this case. The District Court granted the respondent's motion ruling, among other things, that avoidable consequences was the appropriate doctrine to apply in this case (Pet. App. A58-72).

Defense counsel also argued in this motion that the petitioner had the burden of proving that the negligence of Trudy Algee caused Elaine Munn's death. This issue was not decided in the court's ruling on the motion. However, the District Court ultimately rejected Algee's causation argument in a chambers' ruling immediately before commencement of the trial by deciding that Algee had the burden of proving avoidable consequences (Resp. App. 1ra-9ra). Thus, the burden of proving that the refusal of blood transfusions was unreasonable and that Elaine Munn would have lived if the Munns had allowed the transfusions was placed on the defense (Resp. App. 1ra).

However, the District Court further decided to allow the jury to apportion responsibility for Elaine Munn's death, even if it decided that the Munns' refusal of transfusion was unreasonable in order to avoid what the court perceived might be an unfair result. *Id.* This was, without question, an extremely favorable development for the petitioner (Resp. App. 1ra-7ra). *Also see* Pet. App. A14, n. 13, A17-A18, n. 16.

The petitioner's argument on this evidentiary ruling fails to acknowledge the District Court's favorable accommodation to Ray and Elaine Munn's religious faith and their injection of this issue into this trial. Indeed, from the early stages of petitioner's voir dire (Tr. 42-19 through 43-11), through his counsel's lengthy opening argument (Tr. 65, 16-17; Tr. 69, 13-22; Tr. 72, 23-24;

Tr. 73, 17-22; Tr. 74-17 through 75-16), and throughout Ray Munn's direct testimony (Tr. 96, 2-13; Tr. 103, 8-25; Tr. 104-19 through 105-16; Tr. 109-1 through 114-15), a substantial portion of time was spent by Munn's counsel discussing, not only some tenets of the Jehovah's Witness faith, but also how zealously Ray and Elaine Munn followed these teachings.

In contrast, defense counsel only posed two questions to the jury venire on voir dire which related to religion. One was whether any juror had any immediate family member who followed the Jehovah's Witness faith (Tr. 45). The other was whether any prospective juror held the opinion that the Bible prohibited the transfusion of blood for appropriate medical care (Tr. 45). Furthermore, defense counsel stated clearly and unequivocally in his opening statement that he was not challenging the Munns' right to free exercise of their religious beliefs or their right to refuse blood (Tr. 84). Defense counsel did state in opening argument, however, that he was challenging the Munns' right to blame Trudy Algee for the results of their choice (Tr. 84). These were the essential comments made by defense counsel about the Munns' religious beliefs during his opening statement.

Ray Munn was the first witness called at trial. The outset of his direct testimony rightfully opened the scope of cross-examination to a broad discussion of their faith. Ray Munn's direct testimony included the following question and answer:

> Q. How would you describe her zeal in which she took religion? Was she — how would you describe it, was she very strong, very moderate, or a weak Jehovah's Witness? A. No. She was very zealous about her faith. That's what — well, that's what started and got me interested in it. She was teaching the children and also carrying them to the meeting

with her. I started attending meetings with her.

(Tr. 96).

Clearly, Munn's counsel elicited this testimony at such an early stage of the trial for some purpose. Munn's counsel's questions were certainly phrased to evoke sympathy from the jury. With this in mind, was defense counsel obliged not to review the sincerity of this zeal? What better way to test this sincerity is there than to inquire of the petitioner his understanding and knowledge of his religious faith?

In any event, all of Ray Munn's testimony, including direct, cross, and re-direct examination took only a portion of the first day's trial, followed by a very brief period of time on the witness stand the second day.[11] He did not testify again. Thereafter, Munn's counsel called a total of seven witnesses, two of whom provided medical opinions that Elaine Munn would have died even if she had taken the blood transfusions. Algee's counsel called a total of three witnesses, two of whom provided expert medical opinions that Elaine Munn would have lived if she had accepted the transfusions. The trial of this case lasted five days.[12]

Petitioner's focus on the importance of the cross-examination questions posed to Ray Munn in the context of the entire trial is misplaced. Most of the evidence in this case was expert medical testimony produced by counsel for both sides on the issue of whether Elaine Munn would have lived if she had accepted the transfusions (Pet. App. A8, A9, A19).

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11. The trial transcript of this cause consists of 669 pages. Munn's testimony covered pages 95 to 153, which also included a Fed. R. Evid. Rule 403 jury out hearing on the proffered evidence.

12. August 21-25, 1989.

Moreover, the District Court gave much deliberation to this evidentiary ruling in the context of the Munns' use of religious beliefs as legal justification for refusing medically recommended treatment. When presented with petitioner's objection at the close of the first day of trial, the court noted that it would "debate it overnight." (Tr. 143, Lines 9-23). After a full night to consider these issues and before Munn began his testimony on the second day of trial, the court responded to Munn's objection by ruling:

> The Court has carefully weighed this line of cross-examination, pursuant to Rule 403 of the Federal Rules of Evidence, and obviously it has probative value, relevancy in this instance. And the Court does not find that this probative value and relevance is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or by considerations of undue delay, waste of time or needless presentation of accumulative evidence.

(Tr. 147).

In fact, the District Court determined that Munn had opened defense counsel's line of inquiry by stating:

> Indeed the plaintiff in his direct examination professed his very strong feelings about his faith. And to rule that defense counsel cannot make a searching inquiry into that in an attempt to do as he must as defense counsel discredit, impeach that testimony, the Court simply cannot refuse to allow him to do this.

Id.

The District Court clearly believed the area of cross-examination to be relevant under Fed. R. Evid. 401 in light of the direct examination of Ray Munn as to the sincerity of their religious beliefs.[13] Furthermore, after considering Ray Munn's statements about their strong feelings about his religious beliefs, the District Court ruled, *inter alia,* that the probative value and relevance was not outweighed by any danger of unfair prejudice in accordance with Fed. R. Evid. 403.

Nothing underscores the relevancy of this line of questioning more than the jury instruction ultimately given at trial which stated:

> In determining whether or not Elaine Munn's decision to refuse the blood transfusion was unreasonable, you may consider that the blood transfusions were medically recommended. But, you may also consider her religious beliefs and related teachings, together with the known risks of blood transfusions, if you find that to be a factor in her decision.

Munn's counsel had no objection to this instruction as proposed by the court. (Tr. 582). More importantly, defense counsel was the only voice heard objecting to the jury's consideration of religion and religious beliefs as a factor in determining whether Elaine Munn's decision to refuse the medically recommended blood transfusion was unreasonable (Tr. 582). However, due to the District Court's prior ruling on the applicability of the doctrine of avoidable consequences and its decision on the factors which the jury could consider in determining whether Munn's actions were unreasonable, Algee's objection was overruled.

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13. *See* District Court's discussion of this issue in its ruling on petitioner's motion for a new trial (Pet. App. A55).

Petitioner's counsel also made a tactical decision to urge the jury to accept their religious beliefs as legal justification for refusing the recommended medical care during closing argument (Tr. 589, 601-603). How is defense counsel to respond to such an assertion during the plaintiff's closing argument? Defense counsel was compelled to respond to this assertion. Even then, he did so only after emphasizing that he was not challenging the Munns' right to free exercise of religion or right to believe that one cannot take a blood transfusion. Counsel did argue, however, that Ms. Algee did challenge the Munns' right to place responsibility for exercise of that belief on her (Tr. 615, 616.)

The District Court's ruling on the objection to defense counsel's line of cross examination of Ray Munn clearly acknowledged the emphasis petitioner's counsel was placing on this issue. In all fairness, any other ruling on this objection except that made by the District Court would have been extremely prejudicial to defense counsel's ability to appropriately scrutinize the sincerity of the Munns' religious beliefs *vis-a-vis* Algee's liability for wrongful death damages.

B. The Admission Of Evidence Concerning The Sincerity Of The Munns' Religious Beliefs Was, At Most, Harmless Error.

Assuming *arguendo,* the evidence elicited by defense counsel on cross-examination was irrelevant and its admission an abuse of discretion as decided by the Court of Appeals, the District Court's ruling was certainly no more than harmless error. The Court of Appeals, in applying a case by case analysis, rightly determined no "substantial rights" were affected by the evidentiary ruling in question (Pet. App. A7). "Absent a showing that substantial rights of the party were adversely affected, reversal for an erroneous ruling on evidence is not warranted." *Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248 (5th Cir. 1982) *citing Dietz v. Consolidated Oil & Gas, Inc.*, 643 F.2d 1088, 1093

(5th Cir. 1980) *cert. denied,* 454 U.S. 968 (1981). *Also see, LeBoeuf v. K-Mart Corporation,* 888 F.2d 330, 333 (5th Cir. 1989).

After a thorough review of the record, the Court of Appeals concluded that the admission of petitioner's testimony did not adversely influence the jury, applying *Pregeant v. Pan Am World Airways, Inc.,* 762 F.2d 1245, 1249 (5th Cir. 1985) quoting *United States v. Underwood,* 588 F.2d 1073, 1076 (5th Cir. 1979). *Also see, Kotteakos v. United States,* 328 U.S. 750 (1946). Absent from the Court of Appeals' opinion was a decision on whether the error had "but a very slight effect on its verdict." *Pregeant, supra* at 1249. A ruling on this issue was unnecessary. The court's conclusion was that it had no effect, primarily because of the evidence's "utter irrelevance" to the amount of medical testimony presented by the parties (Pet. App. A6, A7).

In any event, petitioner "failed to articulate any substantial right affected by the evidence's admission" (Pet App. A7, A8) and that erroneous evidentiary ruling was not reversible because he did not show how the error caused prejudice (Pet App. A7, n. 7). *Stitt Spark Plug Co. v. Champion Spark Plug Co.,* 840 F.2d 1253, 1258-59 (5th Cir.) *cert. denied,* 488 U.S. 890 (1988). A party asserting error has the burden of proving that "substantial rights" were affected by an erroneous evidentiary ruling. *Dietz, supra,* at 1093. The Munns did not articulate any substantial right affected by the evidence to the Court of Appeals and, consequently, did not carry their burden. *Crumpton, supra,* at 1253.

The Court of Appeals, nevertheless, examined the jury verdicts for any prejudice and found none (Pet. App. A8). First, the court determined that the $10,000 awarded to Elaine Munn's estate for eight hours of pain and suffering was an amount "not as small as to arouse suspicion as to the jury's motives." (Pet. App. A8). This is not odd since the petitioner did not complain

of this verdict to the Fifth Circuit and arguably waived review of same. However, the petitioner now complains of that pain and suffering verdict to Elaine Munn's estate.

Second, the Court of Appeals determined that the jury's failure to award pain and suffering to Ray Munn most likely reflected the minor nature of his injuries (Pet. App. A8). Ray Munn testified that since Algee's car struck the passenger side of his vehicle while he was operating same, he was not injured to any significant degree and that his injury was quite uneventful as far as pain and suffering was concerned. This was substantiated by his minimal medical expenses. Indeed, there were no objective medical findings or evidence presented related to any discomfort Ray Munn might have experienced.

Last, the Court of Appeals determined that the jury's failure to award any wrongful death damages was most likely a result of its belief that Elaine Munn would have lived had she taken the blood transfusions (Pet. App. A8). As discussed above, most of the five days of trial was consumed with expert medical testimony from various physicians on the issue of whether Mrs. Munn would have lived had she accepted the medically recommended transfusions.

The petitioner clearly has the burden of establishing that a substantial right had been affected by the evidence in question. Petitioner not only failed carrying this burden with the Court of Appeals, but failed even articulating a substantial right that had been affected (Pet. App. A8-A9). Consequently, the erroneous evidentiary ruling is harmless. *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 554 (1984). *Also see, Howard v. Gonzales,* 658 F.2d 352, 357 (5th Cir. 1981).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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July 2, 1991.

APPENDIX A — DISTRICT COURT OPINION RENDERED ON AUGUST 21, 1989

THE COURT:

* * *

The one thing — at least one thing — left unanswered in our opinion, which we avoided — I mean which we adopted, the doctrine of avoidable consequences was the burden of proof. I've read both of your briefs. As I hinted earlier, I'm of the opinion that the burden of proof to prove, No. 1, the likelihood of her having survived had she taken it or the fact that she would have survived, and the unreasonableness of her refusing to take the blood transfusion. That's an affirmative defense which the burden is on the defendant in the case.

We started projecting how we're going to handle this situation. In order to avoid what I was beginning to perceive to be a somewhat possible unjust result, Gary, the unjust result he pointed would be for perhaps the tort feasor in this case, Mrs. Algee, to escape any liability for damages other than the point of death, we have read, read and reread, nothing in Mississippi is clearly and explicitly on point.

However, in rereading an opinion by Justice Robertson of our Misissippi Supreme Court, a very scholarly justice, in *Hill v. Dunaway,* 487 S.2d 807, a 1986 opinion, it was an instance where the plaintiff had purchased several six packs of beer with the defendant, knew the defendant driver, and he was a guest passenger in the car, the defendant driver was inebriated and perhaps sleepy, what have you, Justice Robertson, in effect, applied contributory negligence — of course, as such in Mississippi, it's truly comparative negligence, since contributory implies a bar, in Mississippi there is no such thing. He negated the assumption

of risk doctrine. But I think that he — a reading of the opinion convinces me that perhaps this is the forerunner of the way the courts would handle this, an appellant court.

"Undaunted, Hill, the plaintiff, struggles mightily to convince us that he did nothing which caused or contributed to the accident. To be sure there is no evidence that Hill took control of the car or interfered with Dunaway's driving in any way, Hill's error on this point is his failure to understand that the question is whether his acts or omissions contributed to his injury and resulting damages, not whether they caused the car to run off the road. It is both common sense and common law one who rides with a driver who has been drinking extensively and who has become sleepy may be found acting without reasonable care."

Truly, I guess this goes back to the very reason we rejected comparative negligence in our opinion. That is, that the actors didn't act at the same time. The negligent act that brought about the car wreck occurred many hours before the alleged comparable act of the plaintiff in refusing the blood transfusion.

We read some Florida law on the seat belt defense. Came up with one right off the press, *McCoy v. Hollywood Quarries.* And, of course, seat belt, that omission by a plaintiff to use one, assuming the validity of that defense that it would in fact prevent injury, likewise applies at the time the accident took place. But it says here that, "In this case, thus the nonuse of a seat belt caused some or even all of the injuries, the damages should be reduced accordingly. This application of the defense does not permit a defendant to escape liability, but simply does not require the defendant to compensate the decedent's survivors for injuries which were attributable to the decendent's failure to use a seat belt. To accept McCoy's contention that the seat belt defense is

inapplicable in a wrongful death situation would created an anomalous situation by imposing liability for injuries which would have been compensable had the decedent survived. In the instant case, Hollywood Quarries presented evidence to show that if Donald McCoy had been wearing a seat belt he would have survived the accident and suffered no injuries."

Translating that to our situation, your evidence will be had she accepted the blood transfusion she would not have died. Death would not be present here. The ultimate injury. "Therefore, the trial court permitted the jury to consider whether McCoy's failure to use a seat belt produced or contributed substantially to his injuries. The jury found that 25 percent of Donald McCoy's total damages were caused by his failure to use a seat belt. And the trial court in entering final judgment reduced the damages accordingly."

This case jumps over the federal district judge in Florida who didn't buy the seat belt defense there, but an earlier Florida decision in *Insurance Company of North America,* state court Florida decision, *Insurance Company of North America versus Richard Pasakarnis,* a 1984 Supreme Court of Florida decision, found in 451 S.2d 447.

They, of course, discussed at length the pros and cons of the seat belt defense and the fact that they weren't going to adopt — that Florida had not adopted a per se rule or statute. And it said, "We reject the rule that failure to wear a seat belt is negligence per se. We also reject the second approach because contributory negligence is applicable only if plaintiff's failure to exercise due care causes in whole or in part the accident rather than enhancing the severity of the injuries."

Appendix A

You know, I think part of the problem, I believe as Justice Robertson perhaps points out in the Mississippi Supreme Court, is in fact that we tend to hang names or descriptions, such as contributory negligence, on something, and in coming up with my opinion, I said, Oh, there's no way this can be applicable because you've got to have the — you've got to have the negligence of both parties acting at the time of the accident in question.

The Florida court goes on to say, "Rather, we adopt the third approach, which is similar to that taken by the Court of Appeals of New York. Nonuse of the seat belt may or may not amount to a failure to use reasonable care on the part of the plaintiff. Whether it does depends on the particular circumstances of the case. Defendant has the burden of pleading and proving that the plaintiff did not use an available and operational seat belt; that the plaintiff's failures to use the seat belt was unreasonable under the circumstances; and that there was a casual relationship between the injuries sustained by the plaintiff and plaintiff's failure to buckle up. If there is competent evidence to prove that the failure to use an available and operational seat belt produced or contributed substantially to producing at least a portion of plaintiff's damages, then the jury should be permitted to consider this factor, along with all other facts in evidence, in deciding whether the damages for which defendant may otherwise be liable should be reduced. Nonuse of any available seat belt, however, should not be considered by the triers of fact in resolving the issue of liability unless it has been alleged and proved that such nonuse was the proximate cause of the accident." We're past that stage.

"To avoid confusion on the part of the jury in arriving at its verdict where the seat belt defense has been introduced and in order to clearly define the distinction between one's negligent

contribution to the accident, on the one hand, and to his damages on the other, we agree with Judge Swartz's statement in his dissenting opinion" in whatever, a New York case, "but the obvious solution is simply to add interrogatories to the special verdict form to elicit this information. For this reason we authorize the trial courts in appropriate cases to add the following interrogatories to the typical verdict form in automobile cases."

And I'm going through this long dissertation because I think this is the way I'm going to conclude that the matter ought to be handled with the jury. These can be modified and adapted accordingly.

But here's what they said in the interrogatory: "Did defendant prove that the plaintiff failed to use reasonable care under the circumstances by failing to use an available and operational seat belt? Yes or no. If your answer to question A is no, do not proceed further except to date and sign the verdict form. If your answer is yes, proceed on. B. Did defendant prove that plaintiff's failure to use an available and fully operational seat belt produced or contributed substantially to producing at least a portion of plaintiff's damages? Yes or no. If no, quit. If yes, see what percentage of plaintiff's total damages were caused by his or her failure to use an available and fully operational seat belt. These additional interrogatories should follow the interrogatory in the verdict which asks the jury to give the total amount of any damages sustained by the plaintiff and caused by the incident in question. If the jury returns a verdict for the plaintiff and finds that plaintiff's negligence was a contributing cause of the accident, finds that plaintiff's failure to wear an available and fully operational seat belt produced or contributed substantially to producing at least a portion of plaintiff's damages, then the trial court in its final judgment should first reduce the total amount

of damages by the percentage of plaintiff's contributory negligence, and then reduce this amount by the percentage attributable to plaintiff's failure to wear the seat belt."

Let's see. Well, it dawned on me that even though I have excluded, in my opinion, contributory negligence, I had hung the title, the name, the description, on contributory negligence. I think to avoid an injustice it's going to have to be adapted to this case. If they find that — she may be barred totally from any death damages still — I'm not ruling — that her survivors, may be I should say, according to how these interrogatories are answered. Am I clear as muddy water?

MR. SMITH: Yes, sir. The case that you read the sample interrogatories from is which case?

THE COURT: *INA vs. Pasakarnis.*

MR. HARPER: Do we have a cite to the New York case?

THE COURT: We have got the Southern Reporter in there. But I'll — yes, I'm sure they do.

MR. SMITH: Judge, if I can, for the sake of the record, reiterate that, which is probably obvious, because we're having this discussion, that the issue of upon whom the burden of proof rests has been raised in the case. The defendant taking the position that the burden of proof as to the result of death in the wrongful death count of the complaint would require the plaintiff to prove that by the preponderance of the evidence either under a theory of sole causation or under a theory of contributing causation/substantial factor. Just so the record's clear that we pled that, because I do want to protect that for the Record.

THE COURT: Absolutely, I'll be quite honest with you, I'm plowing totally new ground. I really don't like to sit in anticipatory judgment of what the Mississippi Supreme Court would do. But I think from reading what Justice Robertson says, and he may later say that I'm totally wrong, but I think I have gleaned from it the direction the Court would go in order to prevent what could be perhaps described as an injustice under the circumstances. At the same time, giving you your clear opportunity to present this affirmative defense. It may all become moot in the end. Your objection should be of record.

I've carefully read here and I've read your brief six times. You know, it's very novel. And I understand, I think, I'm not being critical, but I think perhaps what we're doing is confusing liability and damages. I think it's important that we distinguish between the two. And I think by putting comparative fault, the comparative fault standard on damages, giving you the opportunity to show that she could have avoided the consequence of death and still, still giving the plaintiff the opportunity to show, well, even though she could have done that, some percentage of her death must be attributable to these initial injuries.

Now *Spear v. Barker,* I don't know where you'll find this, may have to call it up on the computer for you, I guess, 35 New York 2d 444, 323 Northeast 2d, 164. We can pull that up up or get it out of the University. Those are the only two cites. A 1974 opinion. But, you know, he's citing a dissenting opinion in that one. So, I didn't want to get in any deeper. I think I'm in deep enough now.

MR. SMITH: Judge, I learned long time ago to not to argue with the Court after a ruling has been made. I've heard the ruling and I understand and we have noted our exception. Might I inquire

initially if that ruling at this early stage of proceeding is chiseled in stone or subject to further consideration?

THE COURT: No. Other than I thought y'all needed a ruling on the front end about the burden.

MR. SMITH: Yes, sir, we certainly do.

THE COURT: So I'm giving you my ruling on the front end of the burden. I'm telling you on the second part that I think the Florida procedure in these cases is the preferable way. At this juncture I intend to use it.

MR. SMITH: If I can just lead the Court, and then I'll be through with the point, something to consider as you move toward making your mind up on how to handle that, the problem that it creates, even assuming that I'm wrong about the plaintiff's burden of proof to prove the result, which in this case is death, I believe the fallacy of trying to do this is because it is a death case. And your seat belt case that you're talking about, if someone has a bruised leg with a seat belt that becomes a broken leg without a seat belt then there is obvious — obviously a mechanism within which the jury can determine the worsening of the condition. But in a death case it is all one thing, it's either death or it's not. It's going to be difficult to prorate how much her death was made because of failure to take blood. I think that's going to be the problem.

THE COURT: I think what he would do is put on his damages just based on — I mean assuming that you're going to have a medical witness say, and I think that you are, that death most likely would have ensued anyway.

MR. ZERILLA: They all say the death was caused by the injuries. Even Gary's experts.

THE COURT: Now, the distinguishing factor, Gary, *INA vs. Pasakarnis* was a surviving situation. Richard, am I not right? *McCoy v. Quarries,* coming along five years later, was applied in a wrongful death situation. They applied that same rationale reasoning, the Florida Supreme Court did. That's what convinced me.

I'll keep my mind open. But at the outset, and y'all need not worry about telling the jury yet how this thing is going to be handled as a matter of law.